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No. 6165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (a corporation),

Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST (a minor), by Belva Forrest, his guardian ad litem,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

JOSEPH A. BROWN,
De Young Building, San Francisco,
A. L. CRAWFORD,
535 Byron Street, Palo Alto,
Attorneys for Appellees.

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STATEMENT OF FACTS.

In making anew a statement of appellees' version of the facts in this case we explain in doing so that it is because of the incompleteness of the presentation by appellant and the necessity for correcting what appears to appellees to be an erroneous version of the case.

At the outset we wish to emphasize that the amendment to the answer was allowed after the trial started and over the objection of appellees, on the 11th day of February, 1930. (Transcript of Record, page 28; also Transcript of Record, page 91.)

The defenses interposed in the amended answer are lack of notice, failure by the insured to personally deliver the copy of the summons and complaint in the original action of *Forrest v. Kittredge and Hooper,* and lack of cooperation.

Until after the trial started there was no suggestion that any such defense was to be urged by the appellant in this case.

The testimony of Hooper was presented by deposition only, taken October 15, 1929. (Transcript of Record, page 32.)

It will thus appear that on the taking of the deposition of Hooper no testimony was elicited from the witness on either side relative to the issues presented in the amended answer, and the record shows that Hooper was absent from the trial and unavailable as a witness. Hence appellees assert this Court should view the case in the light of these circumstances and that this statement of said facts is deserving of consideration on this appeal.

This case arises out of the following facts. Roy Hooper was a chauffeur for Mrs. E. H. Kittredge some time prior and subsequent to August 8, 1926. On that day, while Hooper was driving an automobile belonging to Mrs. Kittredge and while a chauffeur in her employ and being paid a salary, he accidentally killed one Claude Estell Forrest in the City of Atherton, California.

A suit was brought in the Superior Court of San Mateo County to recover damages arising out of said accident, against both Hooper and his employer, Mrs.

E. H. Kittredge. Shortly thereafter Mrs. E. H. Kittredge died and the action continued against Hooper.

Judgment was obtained by default against Hooper long after appellant received a copy of the summons and complaint—after due notice to the insurance company, appellant herein,—which will be hereinafter more particularly indicated,—and after due notice to the insurance company that such judgment would be taken, and first affording the insurance company, appellant herein, full opportunity to defend said case, of which they had full and exact knowledge.

With this statement of facts, we will proceed to discuss the contentions presented by appellant and being nine in number, in the order in which they are found in appellant's brief.

I.

CONSIDERING APPELLANT'S CONTENTION THAT ROY HOOPER FAILED TO FORWARD TO APPELLANT THE PROCESS SERVED UPON HIM.

We respectfully submit that in presenting this point appellant has ignored the evidence. It appears from the testimony of the witness A. L. Crawford (Transcript of Record, pages 82 to 87):

> "I am an attorney at law, practicing since 1917 in San Francisco and Palo Alto. I am one of the attorneys for the plaintiff in this case and was one of the attorneys for the plaintiff in the case of Forrest et al. vs. Hooper and Mrs. Kittredge. I remember about the time that Mr. Hooper was served with summons here in this city and county.

Q. Did you have any conversation within three or four days after the service of summons on Roy Hooper, with Mr. Gus L. Baraty, one of the attorneys of record in that case?

A. I did. At that conversation besides myself and Mr. Baraty, there was present Mr. Joseph A. Brown, one of the attorneys for plaintiffs in this case, and the conversation took place on the 4th floor of the City Hall.

Q. What was that conversation?

A. The conversation at that time between myself and Mr. Baraty and yourself was to the effect that we had served Hooper about the thirtieth day of January, 1928, and we (62) told him the incident surrounding the serving of Mr. Hooper and how it had taken such a long time to get in touch with Hooper. At that time I told Mr. Baraty that Mr. Hooper could be reached through 585 Geary Street, Hotel Heuer, this city. And that, furthermore, we thought that he was then at Mills Field, and that we would do all in our power to assist in the matter and told Mr. Baraty to take it up with the company.

Q. And what did he say?

A. Mr. Baraty said at that time that he was not interested in litigation and was not providing business for himself. I believe that was the term. That was the substance of the conversation.

Q. But he said that he would take it up with the company?

A. He did, also.

Q. And in the meantime no action was taken?

A. There was no action taken at that time.

Q. Did you see Mr. Baraty again before this default was entered?

A. Yes, I saw Mr. Baraty again.

Q. Do you remember where that was?

A. It was in the courtroom of what I believe is now the courtroom of Justice of the Peace Cornelius Kelly.

Q. That was on the third floor of the City Hall?

A. That was on the third floor of the City Hall, this city and county. At that time I again reminded Mr. Baraty, and asked him what he was going to do, and I told him that we had taken default of Mr. Hooper, but that we would give him ample opportunity to search plenty.

Q. Was anything said about what the Indemnity Insurance Company of North America had said?

A. Mr. Baraty at that time said that he had taken it up with the insurance company and that they were not interested. I believe those were the words that he used.

Q. *Now, then, thereafter and before the default was entered in this case, did you have a conversation with Mr. Cresswell, of the insurance company?*

A. *I was in the office of the Indemnity Insurance Company of North America, and——*

Q. *Located where?*

A. *I think it is located at 206 Sansome Street, this city and county, and I believe it is on the second floor. At that time I spoke to Mr. Cresswell.*

Q. Who was present?

A. I believe Mr. Cresswell and myself were in Mr. Cresswell's little office.

Q. *And that was before default was entered?*

A. *That was prior to the entry of the default.*

Q. *What was said? What was the conversation between you and Mr. Cresswell?*

A. At that time I told Mr. Cresswell that *we were going to take the default of Mr. Hooper, but that we would give them some time yet. Mr. Cresswell said to me at that time that they were not interested; that they had a good defense to this suit; to go ahead. After some more conversation he stated that he had several statements. What they were, I do not know.*

Q. Now, then, did you enter the default after that? Some time after?

A. *I believe that I entered the default about three weeks subsequent to that time.*

Q. *Now, then, did you have a conversation with Mr. Cresswell after the default had been entered?*

A. I did.

Q. In the same office?

A. The same office, on the same floor.

Q. What persons were present?

A. Myself and Mr. Cresswell.

Q. What did you tell him?

A. *I told Mr. Cresswell at that time that we had taken the default and that judgment had been entered. I further told him that if he wanted to, we would set aside the default judgment, and that a trial could be had upon the merits.*

Q. Was that the—all the conversation you had with him?

A. I have had several conversations since that time.

Q. With whom?

A. With Mr. Cresswell.

Q. At the same place?

A. At the same place.

Q. What was the next conversation?

A. Along the same tenor. There was one other thing in which I was involved which has nothing

to do with this action. To that effect. It was about two or three weeks later that I had the first conversation with Mr. Cresswell, and then I had a few conferences with Mr. Cresswell later on." (Italics all ours.)

The only attempted denial of this testimony, that of the witness Cresswell, is as follows (Transcript of Record, page 80):

"At the present time, and for some time prior to August, 1926, I have been the Pacific Coast Claim Manager of the Indemnity Insurance Company of North America, the defendant in this action. I am familiar with the action pending in San Mateo County, entitled Belva Forrest et al. against Kittredge and Hooper.

Subsequent to the service of process in that action upon Roy Hooper, Roy Hooper did not ever confer with me; at no time. He never delivered to me a copy of the process in that San Mateo action.

Q. Now, you know Mr. Crawford, one of the attorneys for the plaintiffs here?

A. Yes, I do.

Q. Do you know any conversations, and by that I mean more than that one, relative to the fact that Hooper had been served in the San Mateo action, and the request by Mr. Crawford upon you and through your company that they were defending for Hooper?

A. No, I do not.

Q. You do not remember any such conversation?

A. No. I do not.

Q. Mr. Crawford has been in your office?

A. Yes, he has, on other matters though, as I recall."

At this point it will be noticed that the only testimony attempting to show that no process was delivered to the company is from the mouth of the witness Cresswell in the following language:

> "Subsequent to the service of process in that action upon Roy Hooper, Roy Hooper did not ever confer with me; at no time. He never delivered to me a copy of the process in that San Mateo action."

The only other attempt to prove lack of delivery of the summons comes from the testimony of the witness Forsyth (Transcript of Record, pages 65 and 66):

> "I knew of the existence of the action referred to that was pending in San Mateo County, and which has been mentioned in this case, in which Mrs. Forrest and her son were plaintiffs and the Indemnity Insurance Company of North America, and Roy Hooper and others, were defendants. I knew of the existence of that suit, *because the papers in that suit were forwarded to us by the assured, Mr. Kittredge.* That was the action that was afterwards dismissed as against Mrs. Kittredge on account of her death.
>
> Q. Were you ever notified by Roy Hooper, the chauffeur, that process had been served upon him in the action pending in San Mateo County?
>
> A. No."

In this connection it should be noted that the language of the policy requiring delivery of the process provides (Transcript of Record, pages 59 and 60):

> "*Notice and Settlement.* D. In the event of accident, the Assured shall give prompt written notice thereof to the Company or to one of its duly authorized agents, and (1) forward to the

> Company forthwith after receipt thereof every process, pleading or other paper of any kind relating to any and all claims, suits or proceedings. The assured shall at all times render to the Company all co-operation and assistance in his power, and whenever requested, shall aid in securing information and evidence and the attendance of witnesses and in prosecuting appeals."

It will thus appear from both the testimony of Mr. Forsyth and Mr. Cresswell that they had full knowledge of the pendency of the action in question and copies of the summons and complaint. (Transcript of Record, pages 65 and 66.)

In other words, the situation amounts to this: A. L. Crawford testified positively that he notified Mr. Cresswell of the service of the summons upon Hooper, of the time when the appearance was due in the action, of the intention to enter the default, and Cresswell definitely stated, according to the testimony of Crawford, that the company did not desire to defend the action but intended to rely upon other matters of defense.

The testimony shows that a copy of the summons served upon Mrs. Kittredge was forwarded by her to the company; that the company was fully advised of the pendency of the action and had the pleadings in the case.

The record also shows that the company had prompt advice of the accident. Mr. Browne, representing the insurance company, testified (Transcript of Record, pages 67 and 68):

"I reside in San Francisco. At present I am not employed. I was formerly employed by the defendant, the Indemnity Insurance Company of North America, in the capacity of claims adjuster and investigator of automobile accidents. In that capacity I investigated the Hooper-Forrest accident. As soon as I was advised that the accident had taken place—I believe it was the next day—I went to Saratoga where Mrs. Kittredge lived, and she related the facts of the accident to me in so far as she knew them.

I first saw Roy Hooper in connection with this accident at the coroner's inquest at Palo Alto, but I did not have any conversation with him until after the inquest. I arrived at the inquest during the latter part of his testimony. After the inquest had concluded I wanted to get Roy Hooper's version of the accident, and all the details concerning it, so I asked him if he would go with me to some place where we could talk it over. We did not want to stand on the street and talk, so we went to Wilson's Candy Store. I drew a diagram of the accident. There was no one else with us during our conversation that afternoon."

The evidence shows that Mr. Browne, investigator for the insurance company, was on the scene of the difficulty the very next day and got a report from Mr. Hooper of what he claims was Hooper's version of the accident, although Hooper testified that this version was incorrect, and Mr. Brown admitted that he had used and employed his own language in putting down what he deemed to be the meaning and intent of the witness Hooper (Transcript of Record, page 75):

"Q. Now, then, Mr. Browne, have you got in that statement anything to the effect that he took the automobile? Let's see the statement. You have in that statement this language: 'She granted permission to take it.' You have that in here. Mrs. Kittredge granted the permission to take it that day.

A. Got it at four o'clock, and——

Q. And that he did not ask her permission to use the car and he didn't know whether she knew it or not?

A. That is true.

Q. But he didn't tell you that he used it of his own accord and of his own volition? Did he use those words?

A. He didn't use the words 'accord and volition.' He said he took the car.

Q. What he did say, according to your best recollection, is what you have written down here?

A. I remember what he told me. He told me so much as I have written down.

Q. That is your own language, the thought that was conveyed to your mind in describing what he said to you?

A. That is quite right."

It thus affirmatively appears from the record:

(a) The company was immediately advised of the accident.

(b) The very next day—in a few hours after the accident occurred—the adjuster and investigator of the insurance company was on the ground and secured the facts of the accident.

(c) That Hooper gave all the cooperation possible.

(d) That Mrs. Kittredge gave all the cooperation possible.

(e) That after the suit was brought and the summons and complaint was served, Mrs. Kittredge immediately forwarded the summons and complaint to the company.

(f) That after the summons and complaint was served upon Hooper the company was immediately advised of that fact and given every opportunity to defend the case and positively declined so to do.

(g) That the policy required notice of the accident to be given to the company, and that the office of the company is shown by the policy to be in Philadelphia (Transcript of Record, page 55), and that not a word of testimony was introduced into the record that full compliance with the provisions of the policy was not made by both Hooper and Mrs. Kittredge.

For the foregoing reasons we respectfully urge that none of the cases presented by appellant in support of the defenses discussed under this heading have any weight.

We think that the language in the case of *Royal Indemnity Co. v. Morris,* 37 Fed. Rep. (2d) page 90, at page 91, fully disposes of this contention:

> "It is further stipulated that service of the complaint and summons in the action was made on Gomez on January 12, 1928, and on the same day counsel for the plaintiff mailed to appellant copies of the complaint and summons with the date of service endorsed thereon, all of which appellant received on January 12th. Also that on January 11th the Hertz Drivurself Stations, Inc., one of the companies named as the insured in the policy, forwarded to appellant copies of the com-

plaint and summons. And it is still further stipulated that the appellant was given timely notice of the automobile accident. In view of these facts, it is no defense that Gomez did not in person forward copies of the complaint and process. Slavens v. Standard Accident Ins. Co. (C. C. A.), 27 F. (2d) 859, and the Colthurst Case, supra."

It being that the company had copies of the summons and complaint immediately, that they were advised of the service of the same upon Hooper and were given every opportunity to defend the case, and that no evidence was introduced by defendant and appellant herein to show that no summons or complaint was forwarded to the office in Philadelphia, the defendant company has failed to sustain any defense.

II.

THE SECOND POINT PRESENTED, THAT HOOPER FAILED TO EXTEND COOPERATION TO APPELLANT IS CERTAINLY DISPOSED OF BY THE FOREGOING AND NEEDS NO FURTHER DISCUSSION.

III.

THE CONTENTION THAT THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT HOOPER WAS LEGALLY OPERATING THE AUTOMOBILE WITH THE PERMISSION OF MRS. KITTREDGE.

The permission that Hooper had to operate the automobile was twofold. The policy provides that it covers persons (Transcript of Record, page 58):

* * * * * * *

"while riding in or legally operating any automobile described in the Declarations and any person, firm or corporation, legally responsible for the operation thereof (exception always a public garage, automobile repair shop and/or sales agency and/or service station and agents and employees thereof) provided such use or operation is with the permission of the named Assured or, if the named Assured is an individual, with the permission of an adult member of the Assured's household other than a chauffeur or domestic servant;"

It is appellees' contention that Hooper had permission from both Mrs. Kittredge and the nurse of Mrs. Kittredge to use the automobile on the occasion in question, and that the testimony of Hooper is not in any way weakened or impaired or controlled by the alleged rule invoked. Appellees believe that the testimony of a person based on the declarations made by a deceased person is not in any way applicable.

Hooper claims that Mrs. Kittredge gave her instructions to him through the medium of the nurse of Mrs. Kittredge—whom no one contends is dead, and whom no one contends was not available as a witness—and also by Mrs. Kittredge herself. The testimony of Hooper, given by deposition, material to the point in question is as follows (Transcript of Record, pages 32, 33, 35, 36, 37, 38 and 39):

"I reside at Glendale. On August 9, 1926, I was employed by Mrs. E. H. Kittredge, of Saratoga, as chauffeur. I had been so employed by her continuously since April, 1926, at a monthly salary of $140.00; my employment was discon-

tinued August 11, 1926; I drove a 1926 Master Six Buick Sedan that belonged to Mrs. E. H. Kittredge; I had driven it continuously from the time I entered her employment; I had an accident with this automobile on August 9, 1926, at about 2:30 A. M. at Atherton, when I struck Claude Forrest, the father of this child, and husband of this widow.

Mrs. Kittredge was my employer and was the one who employed me to drive the Buick Sedan, and who was paying me the $140.00 for driving the car; the conversation had with her was approximately at 4:30 in the afternoon at her place in Saratoga, and I believe the nurse was present at that conversation; I do not know the name of the nurse; when the nurse handed me the package with instructions to deliver it, Mrs. Kittredge was sitting in the library adjoining the living-room; I told Mrs. Kittredge I would return early in the evening before twelve o'clock, if possible; I said I was going to a theater in San Francisco afterwards; I asked her permission to take the Buick Sedan, and thereupon I took the Buick Sedan and went to San Francisco under those conditions; I left San Francisco around twelve o'clock; at the time of the accident I was going south on the State Highway somewhere in the vicinity of Atherton at the time I struck this man, Claude Estell Forrest, and found out afterwards at the hospital in Palo Alto that he was dead.

I saw Mrs. E. H. Kittredge on August 8, 1926, at about 4:30 in the afternoon at her ranch at Saratoga. I had a conversation with her in regard to coming to the city. I think the nurse was present, but I do not remember her name.

* * * * * * *

Q. What did she say to you?

A. I asked her permission to go to the city Saturday afternoon at 4:30, and in so doing, I delivered a package handed to me by the nurse—whether it was Mrs. Kittredge's package being sent there or not,—the nurse handed it to me, and I delivered it to the Fairmont Hotel, and I can't say whether it was from Mrs. Kittredge or the nurse.

* * * * * * *

I told Mrs. Kittredge that I would be back early in the evening, before twelve if possible, and I said I was going to the theatre in San Francisco, and asked her permission to take the Buick Sedan. I drove to San Francisco, and left there about twelve.

Cross-Examination.

I was employed by Mrs. Kittredge April 25, 1926, as chauffeur to drive her wherever she wanted to go.

Q. Now, on the 8th day of August, 1926, you say you had a conversation with Mrs. Kittredge at her residence?

A. Yes, I asked her permission to go to the city and I asked her if I could be released, and if she wanted me for anything else.

Q. Was she a well woman at that time, or was she sick?

A. She hadn't been in good health ever since I had been in her employ.

Mrs. Kittredge had a Buick Sedan and a Ford Roadster; it was my business to drive the Buick, but not the Ford; on the 8th day of August, 1926, I had a conversation with Mrs. Kittredge at her residence; I asked her permission to go to the city and asked her if I could be released and if she wanted me for anything else; it was in the

living-room at her house on the ground floor; on that Saturday afternoon I asked her if she needed me any more for the rest of the day and she said 'No;' I asked, 'May I go to the city?' and she said 'Yes.' Previously to that I turned and asked her if it was quite all right to use the Buick and she said, 'Yes, but be careful;' then I dressed myself and got into the car and left the ranch for San Francisco. The nurse gave me the package and I delivered it—whether it was Mrs. Kittredge's or the nurse's friend, I don't know that—they had so many friends, I didn't know one from the other, as far as their names were concerned. I don't know the name of the nurse. The first time I ever saw her was when I came to work there. I don't know her first name; I never heard her called by name. The package the nurse gave me was about six inches long and an inch and a half wide. It was wrapped in regular department store wrapping papers. The nurse was always with Mrs. Kittredge, because Mrs. Kittredge could not see very well. The nurse told me to deliver the package at the Fairmont Hotel, to the address on the package. I don't know the name; I didn't know what was inside the package; I was not told; Mrs. Kittredge did not say what was inside the package.

Q. On this occasion, did Mrs. Kittredge ask you to deliver this package to the Fairmont?

A. It was handed to me by the nurse, and I presume the nurse was told by Mrs. Kittredge to do so—Mrs. Kittredge did not tell me.

Q. Mrs. Kittredge did not tell you anything in reference to that package?

A. No. Mrs. Kittredge did not ask me to deliver the package to the Fairmont. Nurse generally gave me all the stuff when it was to be

delivered and anything to be taken anyplace—Mrs. Kittredge left that all to the nurse to be taken care of. The package was wrapped in regular department store wrapping paper; the nurse gave me the package standing in the living-room door in front part of the house, entering the front yard; the nurse was in the same room with Mrs. Kittredge; she was always with Mrs. Kittredge because she—Mrs. Kittredge—couldn't see very well; the nurse told me to 'deliver the package to the Fairmont Hotel, if you will, please.' I told Mrs. Kittredge that I would like to go to San Francisco to the theater. I went there because that is where Mrs. Kittredge always kept the car when she was in the city and also when she was at the Stanford Apartments on California Street, and she did all her trading there; my purpose in taking the car there was to leave the car there for the evening. *The storage for the car that evening went on Mrs. Kittredge's bill. I did not pay for that.* (Italics ours.)

Q. When you spoke to Mrs. Kittredge you asked her if you couldn't be released for the day?

A. Yes.

* * * * * * *

Q. What did you do with this package that the nurse had given you?

A. Delivered it to the Fairmont Hotel.

Q. When?

A. That evening.

Q. When about, on the evening?

A. About—I don't know the exact time that I delivered it there.

Q. You haven't any idea what time that evening you delivered the package to the Fairmont Hotel?

A. No. I went up there and turned and came right away from there."

No attempt was made on the trial to prove that the storage on the car at the Abbey Garage on this occasion was not charged on Mrs. Kittredge's bill.

We submit, in view of this testimony, there was overwhelming evidence that Hooper was lawfully driving the car, with the permission and consent of Mrs. Kittredge given by and through the nurse, an adult member of the household, whom the witness testified always gave the orders for Mrs. Kittredge, and that eliminates and utterly demolishes the contention of appellant that this testimony comes within the rule of an oral declaration of a deceased person.

IV.

THE CONTENTIONS UNDER THIS HEADING ARE ALSO DISPOSED OF BY THE ARGUMENTS UNDER POINT III.

V.

APPELLANT URGES THAT CERTAIN INSTRUCTIONS GIVEN AND REFUSED WERE SO GIVEN AND REFUSED ERRONEOUSLY.

We are of the opinion that no compliance with Rule 41 of the United States District Court was made by appellant, and that any such alleged contention cannot be considered on this appeal.

It appears in the transcript of record at page 97, as follows:

"Mr. Baraty. The defendant excepts to the giving of instruction Number VII proposed by plaintiffs, on the grounds that the instruction is not warranted by the pleadings, inasmuch as there is no pleading alleging that permission was given to use the automobile.

The Court. And you do not object to the instruction given by the Court on the subject of notice?

Mr. Baraty. No, I object to the instructions given by the Court generally.

The Court. In the Federal Court you have to specify the particular instruction.

Mr. Baraty. My objection is to any instruction given with reference to permission, that it is not within the issues pleaded.

The Court. As to that instruction, your exception is sufficient."

Rule 41 (page 20, Rules, United States District Court) provides:

"Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the Court, before the jury have retired, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to, and specifying the grounds of such exceptions. As to the charge given by the Court of its own motion, the grounds of exception shall be specific; as to instructions requested by the parties the grounds may be general. The Judge shall note such exceptions in the minutes of the trial or cause the

reporter (if one is in attendance) so to note the same. If, after the jury have retired to deliberate upon their verdict, they return into the Court and request further instructions, the Court may, in the absence of Counsel, give such instructions, and such instructions shall be deemed excepted to by each party."

We therefore think that the complaint as to this instruction in this case cannot be heard at this time, in view of the state of the record.

There is surely only one single conceivable properly reserved exception as pointed out by the Court, and that was to the instruction given on the subject of permission. It would seem that instruction No. 8 completely meets this complaint and disposes of appellant's contention.

VI.

THE CONTENTION THAT APPELLANT SHOULD HAVE BEEN GRANTED PERMISSION TO INTERROGATE THE JURY.

No authority is presented in support of that point. No argument is presented to indicate where any harm or injury did or could arise from this situation.

VII and VIII.

APPELLANT'S POINTS VII AND VIII ARE PRACTICALLY ABANDONED AND ARE SUBMITTED TO THE GENERAL ISSUES ALREADY FULLY COVERED IN THIS CASE.

IX.

APPELLANT'S CONTENTION THAT EXHIBIT "C" FOR IDENTIFICATION SHOULD HAVE BEEN RECEIVED IN EVIDENCE.

The letter in question is claimed to have been written a month and eighteen days after the accident and prior to the institution of the original suit upon which judgment in this action is based. It appears that Mrs. Kittredge died October 20, 1926. It is the contention of appellees that the letter is hearsay and therefore not admissible in evidence. Appellant attempts to escape this objection by claiming the benefits, first of Section 1946 of the Code of Civil Procedure. This section provides that the entries of a decedent or other writings of a decedent at or near the time of the transaction are prima facie evidence, in the following cases: (1) When the entry was made against the interest of the person making it; (2) when it was made in performance of a duty specially enjoined by law.

The letter in question, instead of being one against the interest of Mrs. Kittredge, is a self-serving declaration made in her interest for the reason that if the statements in it were true she was not liable for the accident in question. It is very evident she wrote the note to exculpate and free herself of liability under the rule of *respondeat superior*. Therefore, instead of coming under the provisions of subdivision one, it is directly repugnant to the principle of law which otherwise renders admissible such a document. In one breath appellant urges the letter is admissible because it is a duty enjoined by a con-

tract, and one enjoined by law. It is not a duty enjoined by law such as is contemplated by subdivision three. That section has reference to a declaration which the law requires an individual to make such as a tax report, a report of birth, or anything which therefore borders on the official.

Section 331, Vol. 10 *California Jurisprudence,* page 111:

> "*Self-serving Declarations.* Declarations of a person, since deceased, not against, but in support of his own interests, and made outside the presence of the party sought to be bound by them, are not admissible in favor of those who claim rights which the declarations would maintain. They have no greater force as evidence in an action brought subsequent to the death of the declarant then they would have in an action brought by him in his lifetime. Self-serving declarations, made long subsequent to the execution of a contract sought to be enforced, are not admissible as being part of the res gestae."

It is next contended by appellant that the letter is admissible because of the provisions of sections 1870, 1850 and 1853 of the Code of Civil Procedure. We submit that has no application to the letter in question.

Potter v. Smith et al., 48 Cal. App. 162;
Eddy v. Cal. Amusement Co., 21 Cal. App. 487;
Jones v. Duchow, 87 Cal. 109;
Waldeck & Co. v. Pacific Coast S. S. Co., 2 Cal. App. 167.

Section 1853 of the Code of Civil Procedure relates to a declaration against interest, and we repeat the

declaration in question is a self-serving, hearsay declaration having for its purpose the exculpation of Mrs. Kittredge from legal liability, and not one against her interests but very strongly in support thereof.

It is not true that if Mrs. Kittredge was alive her testimony would have been a complete answer for the reason that it would have been the duty of the jury to determine, even if Mrs. Kittredge testified under oath in accordance with the statement in her letter, whether they would believe the witness Mrs. Kittredge or the witness Hooper, and the fact that the defendant did not produce the nurse to contradict Hooper is to be strongly considered in his favor and invokes the suggestion that had it been favorable to defendant the nurse would have been a witness in person or by deposition.

In view of the state of the record, we respectfully submit that the appellant company:

(a) Had full and immediate notice of the accident;

(b) Had full cooperation from all parties concerned;

(c) Promptly received the summons and complaint;

(d) Were immediately advised of the service of the summons on Hooper;

(e) Time and again stated to the witness Crawford that it would not appear or defend the case, assuming they had any defense;

(f) Failed to prove that the summons and complaint was not forwarded to the company at Philadelphia, and contented themselves with very limited and guarded denials of its witnesses Cresswell and Forsyth that so far as they were concerned, it was not delivered to them personally, and the witness Cresswell failed to deny that he had the conversation with Crawford narrated by the witness Crawford and contented himself with the statement that he did not recall such conversation.

Wherefore, appellees respectfully submit that judgment should be affirmed.

Dated, San Francisco,
October 15, 1930.

JOSEPH A. BROWN,
A. L. CRAWFORD,
Attorneys for Appellees.